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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1950

No. 404

THE WESTERN PACIFIC RAILROAD COMPANY (a corporation),
*Petitioner,*

vs.

PACIFIC PORTLAND CEMENT COMPANY (a corporation),
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI**
**to the United States Court of Appeals for the Ninth Circuit**
**and**
**BRIEF IN SUPPORT THEREOF.**

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## PETITION FOR WRIT OF CERTIORARI
**to the United States Court of Appeals for the Ninth Circuit.**

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

The Western Pacific Railroad Company hereby petitions for a Writ of Certiorari to the United States

Court of Appeals For the Ninth Circuit to review the judgments of such Court in two certain actions entitled in such Court *Pacific Portland Cement Company, Appellant v. The Western Pacific Railroad Company, Appellee,* Nos. 12327 and 12328, said two actions having been consolidated for trial and appeal, and in support of such petition shows the following:

## I.

### STATEMENT OF THE MATTER INVOLVED.

At all times material to these cases Petitioner's railroad was operated in interstate commerce into and through Gerlach, Nevada, and Respondent owned and operated a gypsum and plaster plant at Empire, approximately five miles from Gerlach. Respondent owned and maintained a plant railroad from Empire to a connection with the rail lines of Petitioner at Gerlach and operated over such plant railroad with its own crew and locomotive as a private, not a common, carrier (R. 30-31, 59, 124). These actions were brought by Petitioner to recover demurrage charges on freight cars held by Respondent on its tracks at Empire. Each of the cars involved was removed by Respondent's crew and locomotive from Petitioner's tracks at Gerlach and taken by said crew and locomotive over Respondent's tracks to its plant at Empire where each of such cars was held by Respondent until loaded with freight and returned by Respondent's crew and locomotive to Petitioner's tracks at Gerlach together with shipping instructions (R. 31, 36, 59, 60).

Petitioner contends that under the applicable tariffs demurrage must be computed from the time the cars were removed by Respondent from Petitioner's tracks until returned thereto loaded together with shipping instructions.

Respondent admits that each of such cars was in fact loaded with freight before being returned to Petitioner's tracks (R. 36) but contends that the cars were taken by it and held on its tracks as an accommodation to and for the benefit of Petitioner. The evidence relied upon to support this contention consists of oral testimony as to statements made by Petitioner's station agent at Gerlach in 1926 (R. 139 *et seq.*), various statements in letters written by agents and subordinate officials of Petitioner after the failure to collect demurrage charges had been criticized (R. 241, 242, 243, 245, 285, 286), and the fact that no demurrage was assessed or collected for almost twenty years for the detention by Respondent of cars on its tracks (R. 40).

The principal provisions of the demurrage tariffs involved are:*

*Item No. 500, Rule 1, Section A,* which provides that cars held by or for consignors or consignees for loading, unloading, forwarding directions or any other purpose are subject to the demurrage rules.

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*It was not practicable to print Exhibit No. 1, which consisted of the various demurrage tariffs, as a part of the record but such exhibit is part of the record in its original form. The pertinent provisions are reproduced in Appendix A.

*Item No. 5(b),* which provides that the disposition of a car at the point of detention determines the purpose for which such car is held.

*Item No. 510, Rule 3, Section E,* which provides that in the case of industries performing their own switching the time of detention is to be computed from the first 7 A.M. after placement of the car and continues until the car is returned under load by the industry to the carrier together with the necessary billing instructions.

*Item No. 525, Rule 6,* which provides that a car is to be considered placed for loading when actually placed or held on orders of the consignor. Section D of such rule provides that if an empty car is appropriated without being ordered such car is to be considered as having been ordered and placed at the time so appropriated.

The trial Court found for Petitioner in each case and rested its judgments upon two grounds. First, that as a matter of law the Respondent was liable for demurrage charges computed from the time each of the cars was removed by Respondent from Petitioner's tracks until the time returned by Respondent under load together with billing instructions (Conclusion Nos. 3 and 4, R. 63, 64). This basis of the judgments resulted from the Court's interpretation of the demurrage tariffs as prescribing demurrage regardless of other facts when cars were taken by Respondent onto its own tracks, held there, and loaded. See Conclusion No. 4 (R. 64) where the Court said that each of the cars:

> "* * * was actually used for Defendant's purposes and this alone makes Plaintiff's Demurrage Tariffs applicable irrespective of intended purpose or benefit. Neither understandings nor agreements may stay the operation of tariffs, such understandings or agreements being immaterial. Neither benefit to Defendant nor fault of the carrier is material in the application of demurrage tariffs. It is public policy, not benefits or burdens, which dictates and requires the payment of demurrage. The freight cars involved in this action were taken by Defendant onto its own tracks, held there and loaded by Defendant. The Plaintiff's demurrage tariffs are applicable under these facts without more."

In addition to this legal basis for its judgments, the trial Court took cognizance of the principal defense relied on by Respondent (that the taking and holding by it of the cars was solely an accommodation to and for the benefit of Petitioner), and found as a fact that the taking and holding of the cars by Respondent was not done solely for the benefit of Petitioner, as Respondent contended, but that such taking and holding "was also of advantage to Defendant" (Respondent) (R. 62, Finding No. 9) and that "the evidence is sufficient to show a benefit *in fact* to Defendant" (Respondent) (R. 64, Conclusion No. 4). This same factual point was made by the trial Court in its Opinion (R. 54) where it was pointed out that "There is also evidence that defendant (Respondent) needed and wanted the cars made available", and in the discussion concerning the findings to be made where the trial Court said (R. 335):

> "There was, in my opinion, as I got the evidence in the case, a situation which was just as much for the benefit of the defendant (Respondent) to have these cars there, as it was for the plaintiff (Petitioner) even though the plaintiff (Petitioner) got some benefit from that."

In reversing the judgments of the trial Court the Court of Appeals held that whether or not the Respondent "appropriated" the cars when it physically took them from Petitioner's tracks "depended upon the intentions of (Respondent) in taking the cars onto its tracks and upon the understanding between the parties" (R. 367) and then proceeded to hold that because no demurrage was charged for over twenty years "we must presume that the parties understood and intended that the cars not be considered appropriated" (R. 367) until spotted at Respondent's loading platform. Such presumption was required, according to the Court of Appeals, because (R. 367), if it were to be held that the cars were appropriated when taken by Respondent, both parties would be guilty of a violation of the Elkins Act (49 U.S.C.A. Section 41(1)). The findings of the trial Court were disregarded by the Court of Appeals which, having already decided the case on the basis of the above "presumption", then proceeded to find from the evidence that "both parties regarded the cars stored on (Respondent's) tracks as being held for the benefit of (Petitioner) and subject to (Petitioner's) control" (R. 367).

Whereas the trial Court had based its holding (R. 55) that the question of benefits was immaterial on the provisions of Item 5(b)* of the Demurrage tariffs, the Court of Appeals held (R. 368) that Item 5(b) had no effect whatsoever under the facts involved.

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## II.

### BASIS OF JURISDICTION.

The District Court had jurisdiction under Section 1337 of the Judicial Code (28 U.S.C.A. Section 1337).

The Court of Appeals had jurisdiction under Section 1291 of the Judicial Code (28 U.S.C.A. Section 1291).

The Supreme Court of the United States has jurisdiction to review these matters by Writ of Certiorari under Section 1254 of the Judicial Code (28 U.S.C.A. Section 1254), the judgments of the Court of Appeals having been entered on August 25, 1950, a Petition For Rehearing having been filed on September 22, 1950, and denied by the Court of Appeals on October 9, 1950.

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*Item 5(b) "The disposition at point of detention determines the purpose for which a car is held and the rule applicable thereto, except where there is specific tariff provision to the contrary."

## III.

### THE QUESTIONS PRESENTED.

1. When the policy of the law as set forth in the Interstate Commerce Act (49 U.S.C.A. Sections 2, 3(1), 6(1), 6(7)) and in the Elkins Act (49 U.S.C.A. Section 41(1)) requires that a common carrier's tariffs be rigidly adhered to and that such tariffs must be uniform in their application in order that all shippers and receivers of freight be treated the same, can the question of whether or not a shipper is liable for tariff charges turn on the "intentions and understandings" of an individual shipper and carrier?

2. When the policy of the law as set forth in the Interstate Commerce Act (49 U.S.C.A. Sections 2, 3(1), 6(1), 6(7)) and in the Elkins Act (49 U.S.C.A. Section 41(1), requires that a common carrier's tariffs be rigidly adhered to and that such tariffs must be uniform in their application in order that all shippers and receivers of freight be treated the same, can the question of whether or not a shipper is liable for tariff charges be allowed to turn on a presumption of lawful conduct arising from the fact that as between a particular shipper and carrier such charges had not been assessed over a long period of time?

3. When the framers of the Uniform Demurrage Tariff expressly stated that, in order to prevent discrimination and an abuse of railroad equipment, cars held by an industry under situations such as in these cases were subject to demurrage, can the provisions

of the Uniform Demurrage Tariff, and particularly the provisions of Item No. 5(b), be disregarded and the intentions and understandings of an individual shipper and railroad substituted therefor?

4. When the trial Court has made findings on a factual question contrary to the contentions of the Respondent, which findings are not "clearly erroneous" under *Rule 52, Federal Rules of Civil Procedure,* can the Court of Appeals on the basis of a presumption of lawful conduct, and because of the so-called equities of the case, disregard such findings and make contrary findings?

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## IV.

### REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. While purporting to recognize the overriding purpose and policy of the law as set forth in the Interstate Commerce Act (49 U.S.C.A. Section 1 *et seq.),* the Elkins Act (49 U.S.C.A. Section 41), and the decisions of the Supreme Court of the United States, the decision of the Court of Appeals establishes a precedent in conflict with the purpose and policy of such acts and in conflict with the decisions of the Supreme Court construing such acts.

2. In answering the four questions above in the affirmative the decision of the Court of Appeals establishes a precedent on an important question of federal law which has not been, but should be, settled by the

Supreme Court of the United States, and has established a precedent which will make it impossible for common carriers serving the multitude of industries having plant railroads to require the rigid adherence to the letter of the uniform demurrage tariff which the law requires but, on the contrary, establishes a precedent which will endanger the integrity of the demurrage rules and open them to abuse.

3. In holding that Respondent is not liable for demurrage for the period it stored railroad freight cars on its own tracks the Court of Appeals has construed and applied the uniform demurrage tariff in a manner in conflict with the coverage of such tariff as stated by the Committee, headed by Commissioner Lane of the Interstate Commerce Commission, which formulated such tariff.

WHEREFORE, Petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
November 7, 1950.

Respectfully submitted,
HARRIET P. TYLER,
*Attorney for Petitioner.*

C. W. DOOLING,
E. L. VAN DELLEN,
*Of Counsel.*

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the above Petition is well founded and is not interposed for delay.

Dated, San Francisco, California,
November 7, 1950.

HARRIET P. TYLER,
*Attorney for Petitioner.*

## BRIEF IN SUPPORT OF PETITION.

### THE OPINIONS BELOW.

The opinions of the District Court (R. 54) are reported in 84 F.Supp. 15, 17. The Judgments of the District Court were entered June 8, 1949 (R.66-69) and Notices of Appeal were filed July 8, 1949 (R.69-70).

The opinion of the Court of Appeals (R. 358) is reported in 184 F. 2d 34. The Judgments of the Court of Appeals were entered August 25, 1950 (A. 371, 372), a Petition For Rehearing was filed September 22, 1950 and denied October 9, 1950 (R. 373).

### BASIS OF JURISDICTION

The District Court had jurisdiction under Section 1337 of the Judicial Code (28 U.S.C.A. Section 1337) as the actions arose under a law regulating commerce, i.e., the Interstate Commerce Act (49 U.S.C.A. Section 1 *et seq.*). Suits to collect tariff charges in connection with interstate commerce fall within the coverage of this provision. *Atlantic Coast Line R. Co. v. New York Casualty Co.,* 57 F. Supp. 31 and cases therein cited.

The Court of Appeals had jurisdiction under Section 1291 of the Judicial Code (28 U.S.C.A. Section 1291), the required Notices of Appeal (R. 69-70) having been filed within the period specified by *Rule 73, Federal Rules of Civil Procedure.*

The Supreme Court of the United States has jurisdiction to review these matters by Writ of Certiorari under Section 1254 of the Judicial Code (28 U.S.C.A. 1254), this Petition for Writ of Certeriori having been filed within the period specified by Section 2101 (c) of the Judicial Code (28 U.S.C.A. Section 2101 (c)).

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**STATEMENT OF FACTS.**

The basic facts and tariff provisions involved have heretofore been stated under the heading *Statement of the Matter Involved* (Petition For Writ of Certiorari, p. 2) and in the interest of brevity will not be restated here.

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**SPECIFICATION OF ERRORS.**

1. The Court of Appeals erred in disregarding the provisions of the demurrage tariffs, and particularly the provision of Item No. 5(b) thereof, and in judicially making an exception to such provisions.

2. The Court of Appeals erred in holding that the occurrence of an appropriation as such word is used in the demurrage tariffs (Item No. 525, Rule 6, Section D) depended upon the intentions of the Respondent and upon the understandings of the parties.

3. The Court of Appeals erred in holding that a presumption of lawful conduct coupled with the fact that no demurrage was assessed or collected on cars

held by Respondent requires the Court to presume that the parties understood and intended that such cars not be considered appropriated when taken by Respondent from Petitioner's tracks.

4. The Court of Appeals erred in disregarding the findings of the trial Court which were not "clearly erroneous" and in making a contrary finding upon the basis of a presumption of lawful conduct and the so-called equities of the case.

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## ARGUMENT.

### I.

**UNDER THE INTERSTATE COMMERCE ACT AND RELATED STATUTES THERE MUST BE RIGID ADHERENCE TO TARIFF PROVISIONS AND NO COURT CAN MAKE AN EXCEPTION THERETO AS EXCLUSIVE JURISDICTION TO DECLARE TARIFF PROVISIONS, OR THE RESULTANT CHARGES, UNREASONABLE, PREJUDICIAL OR OTHERWISE UNLAWFUL IS VESTED IN THE INTERSTATE COMMERCE COMMISSION.**

Section 6(1) of the Interstate Commerce Act (49 U.S.C.A. Section 6(1)* requires that a carrier file with the Interstate Commerce Commission tariffs setting forth its rates, fares, etc., and "all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine any part of such aforesaid rates, fares, and charges, or the value of the services rendered to the * * * shipper."

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*The full text of this section and of other statutory provisions referred to are set forth in Appendix B.

Section 6(7) of the Interstate Commerce Act (49 U.S.C.A. Section 6(7)) provides that no carrier shall charge, demand, collect or receive a greater or less or different compensation than that provided for in its tariffs; that no portion of the specified charges shall be refunded or remitted "in any manner or by any device"; and that no carrier shall "extend to any shipper or person any privileges or facilities * * * except such as are specified in such tariffs."

Section 2 of the Interstate Commerce Act (49 U.S.C.A. Section 2) prohibits a carrier "directly or indirectly" from charging or receiving a greater or less compensation from one shipper than it charges or receives from another for the same service and Section 3(1) of such Act (49 U.S.C.A. Section 3(1)) prohibits the giving of any undue preference or advantage.

Section 1 of the Elkins Act (49 U.S.C.A. Section 41(1)) makes it unlawful to fail to strictly observe tariff provisions and makes it unlawful for a carrier to give or a shipper to receive any concession by any device.

The result of these provisions is that "favoritism which destroys equality between shippers, however brought about, is not tolerated." *Union Pacific R. Co. v. United States* 313 U.S. 450 at 462; 85 L.ed. 1453 at 1464. A great many of the cases of this and other courts giving effect to these statutory provisions are collected and quoted in *A.T.&S.F. Ry. Co. v. White,* 49 F. Supp. 797, 799. These provisions as construed

and enforced by the courts apply to demurrage. *Davis v. Terminousville Oil Company* 285 Fed. 470, *Norton v. Shotmeyer* 72 F. Supp. 188.

In a court action to collect tariff charges there must be "rigid adherence" to the provisions of the tariff as written without regard to the inherent lawfulness or reasonableness of the provisions involved or of the resultant charges. *Davis v. Portland Seed Co.,* 264 U.S. 403, 68 L. ed. 762. Exclusive jurisdiction of the question of the reasonableness or lawfulness of such provisions and charges is vested in the Interstate Commerce Commission. *Texas & Pacific R. Co. v. Abilene Cotton Oil Company* 204 U.S. 426, 51 L. ed. 553; *General American Tank Car Corp. v. El Dorado Terminal Company* 308 U.S. 422; 84 L. ed. 361; *Crancer v. Lowden* 315 U.S. 631, 86 L. ed. 1077; *Great Northern R. Co. v. Merchants Elevator Co.* 259 U.S. 285, 66 L. ed. 943.

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## II.

**UNDER THE EXPRESS TERMS OF THE DEMURRAGE TARIFFS CARS REMOVED BY RESPONDENT FROM PETITIONER'S TRACKS AND HELD BY RESPONDENT ON ITS OWN TRACKS UNTIL LOADED WITH FREIGHT AND RETURNED TO PETITIONER'S TRACKS UNDER LOAD WITH SHIPPING INSTRUCTIONS ARE SUBJECT TO DEMURRAGE COMPUTED FROM THE TIME OF SUCH REMOVAL.**

The history, background, and reasons for the formulation of the uniform demurrage tariffs have been recognized by the courts and the Interstate Commerce Commission (*Swift & Co. v. Hocking Valley R. Co.,*

243 U.S. 281, 283, 61 L. ed. 722, 723; *Michigan Mfgs. Assoc. v. Pere Marquette R. Co.* 31 I.C.C. 329) and it has been pointed out that the uniform demurrage tariff was prepared by a Committee of the National Association of Railway Commissioners, headed by Commissioner Lane of the Interstate Commerce Commission, and composed of a representative of each state that had a railway commission. After extensive public hearings this Committee drafted the uniform demurrage tariff and submitted it together with a report* which discussed the coverage of such tariff. This report, of course, is of value in construing the coverage of the tariff and has been used for this purpose (*Michigan Mfgs. Assoc. v. Pere Marquette R. Co.*, 31 I.C.C. 329, 330).

The report of this Committee leaves no doubt that cars held by a plant railroad under the circumstances of the present cases were subject to demurrage. See page 11 of this report where the Committee which drafted the uniform demurrage tariff said:

> "It will be observed that the rules do not exempt railroad cars which are stored on private tracks. Your committee believes that the exemption of cars from demurrage under such circumstances would be extremely unwise. It is a more or less popular practice on the part of large industries which perform their own switching service to 'capture' cars received under lading and

*Report of the Committee on Car Service and Demurrage to the Twenty-first Annual Convention of the National Association of Railway Commissioners, November 16-18, 1909. Published by the Government Printing Office in 1910 in a volume entitled *National Association of Railway Commissioners, Uniform Demurrage Code, Committee Reports and Proceedings.*

> hold them for their own purposes. Such cars are recorded released by the carriers' agents when notice is received that they have been unloaded and placed upon storage tracks; thenceforth they may be held indefinitely for prospective loading, or may be employed in what is known as 'inter-mill service.' In either case it is clear that the practice represents an abuse of railroad equipment and gives the industry an altogether unwarranted advantage over the carriers' other patrons."

Thus, the framers of the tariff meant cars held by an industry on its own tracks to be subject to demurrage and the wording of the tariff carried out this intention.

Basically the question in these cases is whether the cars involved were "appropriated," as such word is used in the demurrage tariffs, when removed by Respondent onto its own tracks and held on such tracks at a point five miles away from Petitioner's rail lines. However, in answering this question other provisions in the demurrage tariffs must be considered, for the "appropriation" rule must be read in the light of the tariffs as a whole. *Pennsylvania R. Co. v. Kittaning I. & S. Mfg. Co.* 253 U.S. 319, 323; 64 L. ed. 928, 930. The Court of Appeals in construing such provision took the position that the intentions and understandings of the parties were controlling and, on the basis of a presumption of lawful conduct and on a finding (contrary to the finding of the trial Court) that the cars were taken for the benefit of the Petitioner, held that there was no appropriation of the

cars when taken by Respondent from Petitioner's rail lines. In taking this position the Court of Appeals disregarded other tariff provisions which make it clear that the cars were appropriated by Respondent when taken from Petitioner's tracks. *Item No. 500, Rule No. 1, Section A* of the tariffs specifically provides that cars held for loading shall be subject to demurrage. Thus it appears at the outset that if the cars involved were taken and held by Respondent for loading Respondent is subject to demurrage charges computed from the time of such taking from Petitioner's tracks. Is there any provision of the tariffs which provides a method of determining whether or not these cars held on Respondent's tracks were held "for loading"? The initial item of the tariffs which sets forth the application of the tariff provides (Item No. 5(b)) that "the disposition at point of detention determines the purpose for which a car is held and the rule applicable thereto, except where there is specific tariff provision to the contrary." The cars involved were detained on Respondent's tracks until loaded with freight and returned to Petitioner's tracks together with shipping instructions and, under Item No. 5(b), this disposition determines the purpose, under the demurrage tariffs, for which the cars were held. Therefore the cars were held by Respondent for loading from the time they were removed by Respondent from Petitioner's tracks. For the purposes of the demurrage tariffs, when the Respondent took cars onto its own tracks for loading can there be any doubt but that this constituted an appropriation of such cars as that word is used in such tariffs? The District

Court in its Opinion (R.55; 84 F.Supp. 15, 16) and Conclusions of Law (R.64) properly held that in view of the provisions of Item No. 5(b):

> "irrespective of intended purpose or benefit the cars were all actually used for defendant's (Respondent's) purposes. This alone makes the tariff applicable."

If there could be any doubt that the above is a correct analysis of the coverage of the demurrage tariffs and the meaning to be assigned to the appropriation rule it is laid at rest by Item No. 445 of such tariffs.* It will be recalled that Item 5(b) provides that the disposition at point of detention determined the purpose for which a car was held "except where there is specific tariff provision to the contrary." Following such provision Items Nos. 10 to 495 provide various specific exceptions to the application of the demurrage rules and charges. Among such exceptions is Item No. 445, applicable on the lines of certain Eastern railroads (but not on Petitioner's rail lines), which covers the situation (almost identical with that involved in the present cases) where an industry removes unordered cars from an interchange track with its own power and stores them on its own tracks until used. Under such facts this exception provides that the time of appropriation shall be the time when such cars are removed from the industry's storage tracks to its loading point rather than the time when the industry removed the cars from the interchange tracks as would be the case but for such exception to the general rules.

*Set forth at length in Appendix A.

No comparable exception exists in the tariffs covering the Gerlach situation. The very fact that an exception was considered necessary on these eastern railroads to exempt the industries from demurrage points up the fact that under the demurrage tariffs an appropriation takes place under facts such as ours when the industry takes the cars into its own possession, holds them until loaded, and returns them in transportation service. The defense interposed by Respondent, and adopted by the Court of Appeals, amounts to no more than an attempt by agreement, express or implied, to make an exception to the tariff without publishing such exception in the tariffs. That the rates, fares, charges, rules and regulations set forth in tariffs cannot be altered, varied or nullified by agreements, express or implied, is well settled. See cases cited and quoted in *A.T.&S.F. Ry. Co. v. White,* 49 F. Supp. 797, 799.

The Court of Appeals held that Item 5(b) had no bearing on the question of the purpose for which the cars were held by Respondent because this provision could not be construed as modifying the natural meaning of the word "appropriated" but that, on the contrary, the intentions and understandings of the parties were controlling (R.367). This disregards the well-settled rule of tariff construction that all parts of a tariff must be read together, and does violence to the policy of the law that tariff provisions must be uniform in their application. In effect the Court of Appeals has held it unreasonable, under the facts involved, to apply Item 5(b) in construing the appropriation rule—but it is well settled that in a suit

to enforce tariff charges a Court does not have the power to hold rules in a tariff unreasonable or otherwise unlawful, such power being exclusively in the Interstate Commerce Commission. See case cited above, p. 17.

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## III.

**THE COURT OF APPEALS ERRED IN DISREGARDING THE PROVISIONS OF THE DEMURRAGE TARIFFS AND IN HOLDING THAT THE OCCURRENCE OF AN APPROPRIATION AS SUCH WORD IS USED IN THE DEMURRAGE TARIFFS RESTS UPON THE INTENTIONS AND UNDERSTANDINGS OF THE PARTIES, WHICH INTENTIONS AND UNDERSTANDINGS, IN TURN, ARE TO BE DETERMINED FROM A PRESUMPTION OF LAWFUL CONDUCT.**

The basic premise of the Court of Appeals is that the time when the cars were appropriated, as that word is used in the demurrage tariffs, depends upon the intentions and understandings of the parties. This does violence to the well-established rules applicable to tariff problems.

The underlying philosophy of the Interstate Commerce Act and related statutes is that all patrons of a common carrier shall be placed on an equal footing. To accomplish this the law requires that all services, privileges, facilities, etc., shall be covered by tariff publications, having the force and effect of law, which shall be uniform in operation and application. This cannot be accomplished by tariff publications if it is possible to vary the interpretation of such tariff provisions between a particular shipper and a particular railroad by agreements, understandings, or intentions. Tariff provisions must be uniformly applied

with no possibility of variation in application based on subjective matters such as understandings and intentions.* To paraphrase the language of the Interstate Commerce Commission in the leading case of *Chrysler Corporation v. N.Y.C.R. Co.* 234 I.C.C. 755 at 758, "to superimpose upon the demurrage provisions the necessity of considering the possible existence of" individual intentions and understandings, "would endanger the integrity of the rules and open them to possible abuse." The basic approach to the problem adopted by the Court of Appeals will create confusion and uncertainty in the railroad industry and leave the way open for great abuse in the application of the demurrage rules to the many large industrial concerns having plant railroads.** Under this decision a railroad station agent or other employe readily can avoid the application of demurrage merely by stating that the industry would be doing the railroad a favor if it would hold cars, intended for ulti-

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*_Pennsylvania R. Co. v. Kittaning I. & S. Co._, 253 U.S. 319, 323, 64 L. ed. 928, 930: "the aim of the (uniform demurrage) code was to prescribe rules to be uniformly applied throughout the country * * * the framers of the code adopted an external standard; that is, they refused to allow the circumstances of the particular shipper to be considered."

**The Court of Appeals apparently believed that the situation at Gerlach whereby Respondent used its own power to haul cars to the plant at Empire was unusual and existed "Because the private tracks of appellant (Respondent) would not sustain a regular freight locomotive". Not only is there no evidence supporting the quoted language, but it is the exception rather than the rule for a railroad to do such switching on the tracks of a plant railroad. Not only do most large industrial plants do their own switching, as Respondent did at Gerlach, but also interchange tracks generally are supplied by such plants, not by the railroad. See the report of the Interstate Commerce Commission in Ex Parte 104, Part II, Terminal Services, 209 I.C.C. 11, and the multitude of supplemental reports in such proceeding.

mate use by the industry, on such industry's tracks. Plants located far from supervision by officials of the railroad would gain a decided advantage and tariffs would be uncertain in application depending on what arrangements in derogation of the tariffs the local agent was willing, or happened, to make. Additionally, whether such arrangements would be held to violate the tariffs or be perfectly proper might well depend on the happenstance of the wording of any letters written or statements made. For example, assume the only facts were that the Respondent with its own engine removed cars from Petitioner's yard and hauled them to Empire where they were ultimately loaded and returned to Petitioner together with billing instructions. In the absence of any further evidence could it be held that the appropriation rule did not apply and demurrage did not accrue for any period in excess of the free time computed from the time the cars were removed from Petitioner's yard? Suppose, however, that an agent of the Petitioner erroneously began computing demurrage from the time the industry began loading rather than from the time of appropriation and that this practice continued for many years. Would the fact that such agent and the plant's employees misunderstood the requirements of the tariff (and thus "intended and understood" that demurrage would not be assessed until such later time) in any way change the situation? Or suppose the railroad agent expressly agreed with the plant manager that the demurrage records would be maintained to show the cars ordered and placed when loading began rather than when removed from

Petitioner's tracks, could it be contended that such express agreement not to charge demurrage (although the parties intended and understood that no demurrage would be assessed) made inapplicable the demurrage which would be applicable but for such agreement? Now, however, under the decision of the Court of Appeals by the fortuitous circumstance that the agent might have made statements, or letters might have been written, suggesting an advantage to the railroad, the whole picture is different!!! Under such decision such statements estop the railroad from claiming that the cars were held for loading and thus subject to demurrage.

If the policy of the law is to be carried out, it just cannot be that whether or not cars taken by a plant railroad onto its private tracks and held until loaded are subject to demurrage is to turn on the understandings and intentions of the parties as shown by occasional conversations on the station agent level. Any such understandings and intentions to be given effect must be contained in the tariffs. If any unusual situations exist which make desirable or necessary an exception to the tariff the proper procedure is a published exception to the tariff (such as Item No. 445 referred to in Heading II). Local understandings between station agents and plant employees cannot and must not be allowed to make such exceptions. The very fact that an exception was considered necessary in the situation covered by Item No. 445 shows that but for such exception the tariff was applicable from the time the industry took the cars from the interchange tracks—just as it is applicable from the

time Respondent took the cars from Petitioner's tracks at Gerlach in the absence of a contrary "intention and understanding" *set forth in the tariff*.

Demurrage charges are not a question merely between an individual railroad and an individual shipper. As was pointed out in *Iversen v. United States* 63 F. Supp. 1001 (affirmed 327 U. S. 767) such charges are not carrier charges or penalties but are "an integral part of the established rules and regulations relating to the use and movement of cars." The use and movement of freight cars is a matter of nationwide concern. If the "intentions and understandings" of a local agent in Gerlach, Nevada, can make uncertain in application that which must, under the policy of the law, be certain in application, the same thing can be done by hundreds of local agents throughout the nation and the movement and supply of cars hindered to the damage of shippers and receivers of freight generally. If any exceptions are to be made they must be published in the demurrage tariffs where they are subject to scrutiny and control by the Interstate Commerce Commission which can suspend their effect and require that they be justified if it appears that the general public interest may be jeopardized.

Under the precedent established by the Court of Appeals, not only will it be possible on the basis of intentions and understandings to vary the application of the demurrage tariffs insofar as industrial concerns having plant railroads are concerned, but also such intentions and understandings are to be deter-

mined, not from the tariff provisions and not from the facts, but from a presumption of lawful conduct. This results from the Court's holding that as Petitioner over the years did not assess or collect demurrage computed from the time Respondent removed the cars from Petitioners' tracks it must be presumed that the parties "understood and intended" that no appropriation take place when the cars were so removed, for otherwise a violation of the Elkins Act would have occurred. In effect the Court of Appeals has held that if a violation of the demurrage tariffs is long continued and acquiesced in by the employees of both parties the tariffs cease to be applicable. If this approach is approved and this precedent is allowed to stand uncertainty replaces certainty and the policy of the law is circumvented.

A presumption of lawful conduct has no proper place in these cases. While such presumption may stand in the absence of any evidence, when the factual situation is disclosed by the evidence "the presumption disappears from the case and the evidence is to be weighed without regard to the presumption." *British American Assurance Co. v. Bowen* (C.C.A. 10), 134 F.2d 256, 259; *Wigmore on Evidence,* 3d Ed., Vol. 9, Section 2491, pp. 289, 290.

In any event, insofar as lawful conduct is concerned the Respondent, and the Court of Appeals, are on the horns of a dilemma. If the demurrage tariffs apply the parties were guilty of a violation of the Elkins Act in failing to assess and to pay the applicable charges. If the demurrage tariffs do not apply

the parties were in violation of the Elkins Act in giving Respondent an unlawful advantage and concession by making available to Respondent on its own tracks a large supply of empty freight cars without charge and without tariff authority therefor. The Court of Appeals chose to presume that there was not a failure to collect applicable tariff charges with the necessary result that the parties were guilty of entering into an arrangement which gave to Respondent an advantage, privilege and facilities (a large supply of cars readily available for its use on its own tracks adjacent to its plant—all of which cars were in fact used by Respondent) without tariff authority as required by Section 6(7) of the Interstate Commerce Act (49 U.S.C.A. Section 6(7)) and in violation of the Elkins Act (49 U.S.C.A. Section 41(1)).

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## IV.

**THE COURT OF APPEALS ERRED IN DISREGARDING THE FINDINGS OF THE TRIAL COURT WHICH WERE NOT "CLEARLY ERRONEOUS".**

In the trial Court and in the Court of Appeals the principal contention made by Respondent was that the cars involved were taken and held by it solely for the benefit and accommodation of Petitioner. From all of the evidence the trial Court found against Respondent's contention and found that such taking and holding "was also of advantage to Defendant" (Respondent) (R. 62, Finding No. 9) and that "the evidence is sufficient to show a benefit in fact to Defend-

ant" (Respondent) (R. 64, Conclusion No. 4). In its Opinion the trial Court stated:

> "There is also evidence that Defendant (Respondent) needed and wanted the cars made available."

At the hearing to settle the findings the trial Court said (R.335):

> "There was, in my opinion, as I got the evidence in the case, a situation which was just as much for the benefit of the defendant (Respondent) to have these cars there, as it was for the plaintiff (Petitioner) even though the plaintiff (Petitioner) got some benefit from that."

The Court of Appeals reversed this finding and held, on the basis of a presumption of lawful conduct (R.367), on the basis of the so-called inequities of the trial Court's findings (R.369), and on the basis of certain of Respondent's evidence (R.367, 368), that the Respondent took and held the cars involved solely for the benefit of and as an accommodation to Petitioner.

Under the provisions of Rule 52, *Federal Rules of Civil Procedure* the findings of fact of the trial Court are not to be set aside unless "clearly erroneous" and no such finding is justified under the evidence of record. The Court of Appeals, in reversing the trial Court's findings of fact, stated (R. 367, 368) that:

> "The conversations between the station agents, the practice of Appellee (Petitioner) in not computing demurrage until the cars were spotted for loading, the letters written by Appellee's Peti-

> tioner's) officers after the question was raised by the demurrage bureau"

sustain an "inference" that "both parties regarded the cars stored on appellant's (Respondent's) tracks as being held for the benefit of appellee (Petitioner) and subject to appellee's (Petitioner's) control" and that any benefit to Appellant (Respondent) was an incidental benefit. Thus the finding of the Court of Appeals, contrary to that of the trial Court, was based on an inference drawn from a part only of the evidence. The evidence as a whole clearly supports the trial Court's findings for it shows the following:

Respondent was practically the only shipper of carload freight from Gerlach. With the exception of an occasional time when a train would be reduced in size at Gerlach and cars left there until the next train came through (2 to 10 hours later) no empty cars were left at Gerlach except for the purpose of loading (R. 254-255). Reduction of trains at Gerlach happened "very seldom" (R. 259-260), such reduction usually being accomplished at another station (R. 260). Thus the only reason empty freight cars were at Gerlach at all was for the use of the Respondent. The "congestion" which Respondent claimed caused it to remove the cars to Empire "for the benefit and convenience of the railroad" was brought about by the fact that empty cars were at Gerlach for the use and benefit of the Respondent. The record shows that Respondent was quite concerned with maintaining a supply of empty cars at Gerlach and was repeatedly after Petitioner to bring more cars there in

order that Respondent might be assured of the supply of empty cars it desired. See Exhibit No. 5 (R. 296-298) which shows that Respondent was so concerned with this subject that it caused it to be handled on the highest possible level, i.e., between its President and the President of Petitioner, and requested and secured assurance that Petitioner would bring "at least" fifteen cars a day to Gerlach for the Respondent's use. See also the telegram sent by Respondent's Traffic Manager (Exhibit No. 5, R. 298), in which it is recited that Petitioner had agreed to "build up a car supply to protect this loading" (Respondent's loading at Empire).

In addition to requests made on the higher administrative levels that a car supply be maintained at Gerlach for Respondent's use, Respondent's Chief Clerk at Empire also made such requests of Petitioner's forces at Gerlach (R. 290-291).

That empty freight cars were kept at Gerlach and at Empire for the benefit of the Respondent is shown by Exhibit D (R. 285, 286) where it is stated:

> "* * * we (Petitioner) must keep a large supply of cars in order to keep the plant (of Respondent) running."
>
> "* * * we (Petitioner) must keep a large supply (of cars) at Gerlach to protect this business (of the Respondent). *The P.P.C. Co. (Respondent) does not keep more cars at the plant (Empire) than they need to protect them against the failure of their engine or other causes.*" (Emphasis added.)

To the same effect see the testimony of Mr. Howell (R. 285).

In Exhibit B (R. 241, 243) it is said of the Respondent's practice of moving and storing the cars it required:

> "* * * if this were not done there would be many times that we (Petitioner) would be out of cars for their (Respondent's) plant's loading."

See also Exhibit A (R. 241, 242) where this practice was referred to as being done:

> "* * * to protect that important plant (Respondent's plant) with sufficient freight car equipment to fulfill their loading needs."

From all of the evidence (not just a part as relied on by the Court of Appeals) the trial Court, with the witnesses before it, took a realistic view of the situation as contrasted with the academic, naive and unrealistic approach of the Court of Appeals. Under the contentions of Respondent, accepted by the Court of Appeals, we are to believe that out of the goodness of its heart a large industry engaged in business for profit, not only without payment or consideration of any kind but actually at considerable inconvenience and expense, furnished storage space for Petitioner's cars, performed switching of such cars to and from the loading points, and (as the Court of Appeals holds that the cars at Empire were subject to Petitioner's control) was willing to haul such cars back and forth between Gerlach and Empire whenever desired by Petitioner!

The Court of Appeals' unrealistic findings are based on the proposition that Petitioner was benefited because congestion in its yard at Gerlach was relieved. Under this argument demurrage could never be due under the appropriation rule for the same thing can be said of any private spur or plant railroad tracks. See *Granger v. Davis,* 2 F. (2d) 695, where, in a demurrage case, the Court said (p. 697):

> "It is clearly a private yard and not a general railroad facility * * *. That it facilitates the handling of freight, relieves the general yards and is advantageous to the railroad is beside the mark. The same is true in a greater or lesser degree of every private industry switch."

Respondent has argued that because much of the evidence consisted of letters, depositions and admissions the requirement of Rule 52, *Federal Rules of Civil Procedure* need not be followed. But the primary basis of Respondent's contention in these cases was the oral testimony of Mr. Nottingham (R. 135-153). Clearly the Court of Appeals was in no position to substitute its judgment for that of the trial Court in passing upon the weight, or lack of weight, to be given to such testimony. So, too, in large measure the opinions and conclusions stated in the letters relied on by the Court of Appeals were at variance with the testimony of Mr. Howell (R. 247 et seq.), who, it should be noted, was physically present at Gerlach several days a week during the period involved (R. 248) and not merely twice during the whole period as was Mr. Foster (R. 181) whose deposition was read

and who wrote one of the letters relied upon by Respondent. Additionally, there is absolutely no evidence that the writers of the other letters were ever at Gerlach and familiar with the situation at such point. The trial Court was in far better position than was the Court of Appeals to compare and judge the testimony of Mr. Howell and weigh the letters in the light of such testimony.

In the final analysis the real basis of the Court of Appeals' action in reversing the trial Court is disclosed near the end of its Opinion (R. 369) where it is stated that any other holding would be inequitable and that if the tariffs were applicable then they would be of questionable invalidity. The inequity is said to lie in the fact that holding the tariff applicable would result in Respondent having to pay for a service rendered by Respondent to Petitioner. Such holding, of course, presupposes that the taking and holding was solely for the benefit and accommodation of Petitioner. Under the findings of the trial Court, which are not "clearly erroneous", no such inequity exists. Actually, the so-called equities of the case have no bearing on the question of the application of tariff provisions. If a tariff provision results in inequities or is illegal the remedy is provided by the Interstate Commerce Act and the matter must be presented to the Interstate Commerce Commission—a Court cannot grant relief. See cases cited at p. 17.

In connection with this phase of the Opinion of the Court of Appeals it is rather surprising to find such Court citing and relying on *Indiana Harbor Belt R.*

*Co. v. Jacob Stern & Sons,* 37 F. Supp. 690. This case stands completely alone and has never before been cited or followed by any court. It is contrary to decisions holding that a tariff provision may not be held unreasonable or otherwise unlawful in a court proceeding. The principles adopted by the court in the *Indiana Harbor Belt Case* resulted in a holding that the tariff provisions involved were unlawful and unenforceable despite the fact that such provisions had long before been upheld as reasonable and lawful by the Interstate Commerce Commission in *International Agricultural Corp. v. A. & W.P.R. Co.,* 93 I.C.C. 189. In reaching its conclusion the *Indiana Harbor Belt Case* relied on an Interstate Commerce Commission decision which had been modified by such body in the above case. The question involved in the *Indiana Harbor Belt Case* was not new but had previously been before both Courts and the Commission and in each such prior cases the principles and arguments adopted by the Court in the *Indiana Harbor Belt Case* had been considered and rejected. See *Procter & Gamble Co. v. C. H. & D. Ry. Co.,* 19 I.C.C. 556; *Procter & Gamble Co. v. United States,* 188 Fed. 221 (reversed on other grounds 243 U. S. 281); *Pittsburgh, C. C. & St. L. Ry. Co. v. Freedom Oil Works,* 247 Fed. 573; *National Refining Co. v. St. L. & I. M. & S. Ry. Co.* (C.C.A. 6), 237 Fed. 347.

## CONCLUSION.

In view of the above, a Writ of Certiorari should be issued to review the judgments of the United States Court of Appeals for the Ninth Circuit and such judgments should be reversed.

Dated, San Francisco, California,
November 7, 1950.

Respectfully submitted,
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C. W. DOOLING,
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**(Appendices A and B Follow.)**

## Appendix A

### PERTINENT PROVISIONS OF FREIGHT TARIFF 4-X, CAR DEMURRAGE RULES AND CHARGES.

### GENERAL APPLICATION OF DEMURRAGE RULES AND CHARGES

| Item No. | Application |
|---|---|
| | (a) The Demurrage Rules and Charges, published herein are the separately established rules and charges of each of the participating carriers, and apply on Interstate and Intrastate traffic at all points on the railroads listed on pages 4 to 15, inclusive, under column headed Section 1 (Demurrage), except as otherwise specifically provided herein, and except, further, that the rules and charges will not apply in the Dominion of Canada (except as shown on pages 20 to 25, incl.), nor in the Republic of Mexico. |
| | (b) The disposition at point of detention determines the purpose for which a car is held and the rule applicable thereto, except where there is specific tariff provision to the contrary. |
| | (c) For the purpose of these rules, a privately owned or leased track, or any railroad track or portion thereof assigned for individual use, will constitute an "other-than-public-delivery" track. |

• • • • • • •

### SPECIAL EXCEPTIONS TO DEMURRAGE RULES AND CHARGES.

| Item No. | Applicable at, or in Connection with | Exception |
|---|---|---|
| 445 | **The Central Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad, Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company** (Eastern District), **The New York, New Haven and Hartford Railroad Company, The Pennsylvania Railroad Company Reading Company** | **Exception to Rule 3, Section E, Item No. 510 (or reissues):** When the interchange of cars between this railroad and an industry performing its own switching is made by this railroad's car float, and empty cars not ordered by such industry are delivered to it by and for the operating convenience of this railroad and set off by such industry's power on a designated track or tracks until required, such cars on such track or tracks will not be subject to demurrage rules until subsequently appropriated therefrom by the industry's power (see Rule 6, Section D, Page 46). If, for the operating convenience of this railroad, the industry shall hold on such track or tracks outgoing loaded or empty cars pending movement to and loading on this railroad's car float, the placing of such cars on such track or tracks shall be considered delivery to this railroad in computing time cars are held by the industry, provided shipping instructions have been furnished on outgoing loaded cars. Such industry must notify this railroad the date and time its power appropriates an empty car from such track or tracks, and the date and time a loaded or empty car is returned to such track or tracks. If such industry fails to so notify this railroad, the industry's float bridge will be considered the interchange track in applying Rule 3, Section E. |

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## DEMURRAGE RULES AND CHARGES.

| | RULE |
|---|---|
| **Rule No. 1**<br>**Cars Subject to Rules; also Exemptions Therefrom**<br>**Item No. 500** | **Section A.**—Cars of either railroad or private ownership, held for or by consignors or consignees for loading, unloading, forwarding directions or for any other purpose (including cars held for loading company material unless the loading is done by the railroad for which the material is intended and on its tracks or private sidings connecting therewith), are subject to these demurrage rules, except as provided in Section B.<br>• • • • • • • |
| **Rule No. 3**<br>**Computing Time**<br>**Item No. 510** | **Section E.**—1. Except as otherwise provided in Section B, Paragraph 1, of this rule, and in Paragraph 2 of this section, on cars to be delivered on interchange tracks of industrial plants performing the switching service for themselves or other parties, time will be computed from the first 7:00 A.M. after actual or constructive placement on such interchange tracks until return to the same or another interchange track. Time computed from actual placement on cars placed at exactly 7:00 A.M. will begin at the same 7:00 A.M.; actual placement to be determined by the precise time the engine cuts loose. (See Rule 2, Section A, Paragraph 2, page 41, Rule 4, Section C, page 45, Rule 5, page 46, and Rule 6, page 46.) Cars returned loaded will not be recorded released until necessary billing instructions are furnished.<br>**Note.**—Where two or more parties each with its own power take delivery from the same interchange track, or where the railroad company uses the interchange track for other cars, or where the interchange track is not adjacent to the plant and the industry uses this railroad's tracks to reach same, a notice of placement shall be sent or given to the consignee and time will be computed from the first 7:00 a. m. thereafter.<br>• • • • • • • |
| **Rule No. 6**<br>**Cars for Loading**<br>**Item No. 525** | **Section A.**—Cars for loading will be considered placed when such cars are actually placed or held on orders of the consignor. In the latter case the agent must send or give the consignor written notice of all cars which he has been unable to place because of condition of the other-than-public-delivery track or because of other conditions attributable to the consignor. This will be considered constructive placement. (See Rule 3, Sections A, D and E, pages 43 and 44.)<br>• • • • • • •<br>**Section D.**—If an empty car is appropriated without being ordered, it shall be considered as having been ordered and actually placed at the time so appropriated. If not loaded outbound, such car is subject to Section B of this Rule. |

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## Appendix B

Section 2. Interstate Commerce Act (49 U.S.C.A. § 2):

> Sec. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3(1). Interstate Commerce Act (49 U.S.C.A. § 3(1)).

> Sec. 3(1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to

any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 6(1). Interstate Commerce Act (49 U.S. C.A. § 6(1)).

Sec. 6(1). That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges,

or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Section 6(7). Interstate Commerce Act. (49 U.S. C.A. §6(7)).

Sec. 6(7). No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 1. Elkins Act (49 U.S.C.A. §41(1)).

Sec. 1. That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any such carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof,

or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every

case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States

is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1950

No. 404

THE WESTERN PACIFIC RAILROAD COMPANY
(a corporation),
*Petitioner,*

vs.

PACIFIC PORTLAND CEMENT COMPANY
(a corporation),
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### I.

### OPINIONS BELOW.

The opinions of the District Court (R. 54) are reported at 84 F.Supp. 15, 17. The opinion of the Court of Appeals (R. 358) is reported at 184 F.2d 34.

## II.

### STATEMENT OF THE CASE.

**A. Preliminary statement—This is a suit for demurrage which the Court of Appeals decided against petitioner Railroad on the ground "that the tariffs themselves impose no liability for demurrage under the facts of the instant case" (R. 363).**

The petitioner Railroad brought two suits, later consolidated, for demurrage alleged to have accrued between 1944 and 1946 (R. 2-6). The Court of Appeals decided in favor of respondent Cement Company (R. 358) holding that under the facts conclusively established (R. 361) by uncontradicted evidence (R. 366, 367) the Railroad's claim for demurrage was not supported by the provisions of the tariff. The case was decided on the application of the particular facts here presented to the particular tariff provision relied on by the Railroad and the decision was that the tariff did not apply. The Court of Appeals said (R. 363):

> "We agree that published tariffs are binding on both carrier and shipper and that the shipper's liability under such tariffs cannot be waived by any arrangement, understanding or course of conduct between the parties [citing authorities]. It is no less true, however, that the tariffs themselves impose no liability for demurrage under the facts of the instant case."

**B. The tariff provision involved—Petitioner, respondent, and the Court of Appeals all agree that the basic question is whether the cars in suit were "appropriated" within the meaning of that word in the demurrage tariffs.**

The petitioner agrees with respondent and with the Court of Appeals as to the tariff provision on which the

case turns, namely, Rule 6, section D, of Demurrage Tariff 4-X, reading as follows (R. 366):

> "If an empty car is appropriated without being ordered, it shall be considered as having been ordered and actually placed at the time so appropriated."

The petition states (p. 19):

> "Basically the question in these cases is whether the cars involved were 'appropriated,' as such word is used in the demurrage tariffs * * *."[1]

The Court of Appeals decided that there was no appropriation as claimed by the Railroad. The facts on which the Court so decided are as follows:

**C. The facts.**

While demurrage claimed in this case is for a period between 1944 and 1946 (R. 2-6), the history of the case actually begins twenty years earlier in 1924. In that year the Cement Company commenced operations at its Empire gypsum plant, and built an industry track some 4½ miles long connecting this plant with the Western Pacific's yard and main line at Gerlach, Nevada (R. 136-138). The industry track was the property of the Cement Company and not a common carrier (R. 138). The Cement Company also provided its own engine (R. 139) since the Rail-

[1]Three other tariff rules quoted by petitioner (Petition, pp. 3-4, and Appendix to Petition) are argued only for their alleged bearing on the construction of "appropriated" (Petition, p. 19). Appropriation is the only basis of recovery alleged in the complaints. These, as shown by the allegations thereof (R. 4) and by express statement of counsel at the pretrial conference "were made upon the basis of appropriations" (R. 88). They make no references to other tariff provisions (R. 4).

road had no switch engine or switch crew at Gerlach, and its switching there was done by main line locomotives (R. 273).

Gerlach is a small town on the Nevada desert but an important point on the Railroad's main line. East and west bound trains pass there on transcontinental trips; it is a servicing point for all trains for oil and water and a meal stop for crews (R. 244). When three or four trains stop at one time, as often happens, the yard, as pointed out by the Superintendent of Transportation of the Railroad, must be kept clear of other equipment to provide trackage for them (R. 244).

Except for a few carloads of cattle, the Cement Company originated the only carload freight shipments from Gerlach during all times material to this case (R. 213). During the period in suit it was sending out 15 to 20 loaded cars a day (R. 245). It was of course the Railroad's duty as a common carrier to use diligence to provide the Cement Company with a reasonable supply of cars.[2] About the only empties originating at Gerlach were a few occasionally dropped off in reducing the size of transcontinental trains (R. 254); consequently empties for loading had to come from points in California and had "to be moved nearly 400 miles" (R. 52, 212); this, as stated by the Superintendent of Transportation, made it impossible to work "on a day to day basis" (R. 244) and meant, as stated by the Division Superintendent (R.

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[2]The Court of Appeals so pointed out (R. 368, citing *Davis v. Cornwell* (1924) 264 U.S. 560).

245), that "**for the railroad's convenience**"[3] it was necessary to keep three, four or five days' supply of empties on hand (R. 243, 245), and also, as pointed out by the Superintendent, to keep the yards sufficiently clear to perform switching and other station services and leave trackage for through trains (R. 244). The Railroad **never** provided facilities to meet these various demands of its own service, for switching, car supply, servicing and passing of trains, etc. When three or four trains stopped at once there was no room left (R. 244). The gist of the situation was expressed by the Railroad's Assistant Superintendent of Transportation: "**There was never enough trackage at Gerlach**" (R. 167).

When the Cement Company started operations in 1924 its practice was to order empty cars as needed for immediate loading, and these cars did not move from the Railroad's yard to the industry track except on written car orders of the Cement Company (R. 138-140). In 1926 because of the limited facilities in the Railroad's yard (R. 143) the Railroad's agent asked the Cement Company Superintendent to take empties from the yard and store them on the Cement Company's tracks (R. 140-148). The Cement Company acceded to this request and thereafter, as it had room and with its own engine, moved cars to the industry track, not in accordance with its own needs for immediate loading but in the "irregular quantities" in which cars happened to come into the Railroad yards (R. 146). These even included **bad-order cars**, which had

[3]All emphasis is ours throughout this reply unless otherwise indicated.

to be repaired to be usable (R. 303). During the war years there was added congestion, and the Railroad's agent often urged the Cement Company to move more cars from the yards (R. 231).

The Cement Company furnished the Railroad with daily reports showing the cars stored on the Cement Company's tracks for the Railroad's account (R. 230). These reports went daily from the Railroad's local agent to the Superintendent of Transportation in San Francisco (R. 230). Cars stored on the industry track were treated by the Railroad in the same way as cars stored in the Railroad's yards at Gerlach (R. 230). The Court of Appeals said (R. 367):

> "The reasonable inference to be drawn from the uncontradicted evidence is that both parties regarded the cars stored on appellant's tracks as being held for the benefit of appellee and subject to appellee's control."

After the arrangement of 1926 the Cement Company continued, as before, to place car orders in the regular form for cars as needed (R. 141). These orders, however, were now filled from cars in storage on the industry track (R. 141) or from cars in the Railroad's yard (R. 146). If the Cement Company used more than the free time allowed by the tariff after the cars were spotted for loading pursuant to these car orders, the Cement Company paid demurrage (R. 233). Cars in this category are *not* involved in the present case; this case concerns the Railroad's claim for demurrage for the period of storage before the cars were ordered, and is based on the theory

that the cars were "appropriated" when placed on the Cement Company's track, notwithstanding that such placement had occurred at the Railroad's request to relieve conditions due to the inadequacy of the Railroad's own facilities and that it occurred before the Cement Company ordered or needed the cars (R. 140, 145-146).

The arrangement described above continued for more than twenty years. At no time did the Railroad make any suggestion that cars in storage were not held for its account—which clearly they were (R. 230)—or were subject to demurrage under the construction which the Railroad now seeks to put on the tariffs. During all these twenty years the Pacific Car Demurrage Bureau had a representative in the Gerlach territory "to check the station records as to car handling and to see that the tariffs were upheld" (R. 312-314), but the Demurrage Bureau never suggested that there was anything wrong with, or that any demurrage accrued from, the storage arrangement. In 1946, however, a new agent of the Bureau took a different view and recommended that the Cement Company be charged demurrage from the time cars were taken to its tracks (R. 304-318). Following this recommendation there was a series of correspondence between responsible representatives of the Railroad, including the Division Superintendent and Superintendent of Transportation, and between the Railroad and the Demurrage Bureau (R. 242-246, 286). Concerning the letters so written the Court of Appeals said (R. 361):

> "These, together with oral testimony, conclusively establish the agreement and arrangement under which the parties operated for so many years."

Referring briefly to these letters we first quote the Division Trainmaster, writing to the Division Superintendent on April 8, 1946 (R. 286):

> "• • • further investigation of this situation reveals that the P.P.C. Co. move empties into their yard at Empire in accordance with their ability to handle them. In this way they relieve the congestion in our yard at Gerlach where we must keep a large supply of cars in order to keep the plant running.
>
> • • • • • • •
>
> In my opinion demurrage should not be charged to them for the privilege of storing our cars in their yard."

The Division Superintendent wrote to the Demurrage Bureau on April 11, 1946 (R. 245):

> "Our investigation of this matter indicates that over a long period of time, and particularly since business became so heavy, that the P.P.C. Company stores empties in their yard at Empire so as to relieve congestion in our yard at Gerlach. They will, of course, if they are forced to pay for time for storing these empties in their yard at Empire, require us to hold them at Gerlach and move them to Empire only if they can load them and this will only add to our yard congestion at Gerlach and might force us to provide more trackage.
>
> They are loading 15 to 20 cars per day and **for the railroad's convenience** it is necessary to keep a supply of at least 3, and preferably 4 or 5 [days' supply of (R. 243)] empties, on hand at Gerlach for their use."

The Superintendent of Transportation wrote to the Demurrage Bureau on April 16, 1946 (R. 244):

"We must realize that the equipment for this plant, with but very few exceptions, has to be moved nearly 400 miles and this is a long distance to have to move equipment and expect to more or less run on a day to day basis.

The entire Western Pacific trackage at Gerlach will accommodate approximately 375 cars, but this however is one of the main meeting points for east and westbound trains, is a servicing point for all trains for oil and water as well as an eating point for the train crews and as a result it is not uncommon to have as many as three and four trains there at one time and we therefore have to keep this yard clear enough of empty equipment to provide trackage for these various trains."

The Superintendent of Transportation wrote the Demurrage Bureau on May 15, 1946 (R. 242):

"I respectfully refer you to our letter dated April 16, file F-835 in connection with *our practice of storing* freight car equipment on the tracks belonging to the Pacific Portland Cement Co. at Gerlach *instead of utilizing our limited track space in our Gerlach railroad yard for this purpose.*"

It thus appears that in the years prior to World War II, the storage arrangement eased congestion in the carrier's yard and simplified problems of car supply. During World War II the congestion was intensified by wartime traffic (R. 159). Incident to such traffic the heaviest movement of freight was east-west for military purposes and empty cars accumulated in the west (R. 205-208). Consequently there was no scarcity of empties for Gerlach during this period, but there was an added burden on

the already insufficient station facilities of the carrier and it was more important than before that the Railroad have its tracks and yard clear for the movement of through traffic and the performance of station services (R. 244-245).

Doubtless by reason of the views of the new agent of the Demurrage Bureau (see R. 368) the Railroad terminated the storage arrangement in June, 1946, and later in the same year brought these suits (R. 361). The Court of Appeals, reversing the District Court, decided for the Cement Company (R. 358). It characterized the arrangement between the parties as "longstanding, reasonable and beneficial" (R. 370). It overruled the Railroad's claim for demurrage on the ground, as already stated, that the facts established by the evidence were not within the demurrage tariffs. It held that this application of the facts to the tariff language involved no discrimination, no unlawful advantage to the Cement Company (R. 368), and no infringement of the letter or policy of the Interstate Commerce Act (R. 370).

We submit that no other result could be justified on this record. There is no allegation, contention, or evidence that the arrangement in suit ever led to any unreasonable accumulation of cars for the Cement Company's benefit, or ever gave the Cement Company any cars to which it was not legally entitled, or which it was not the Railroad's duty to provide. The evidence is undisputed that the Railroad's facilities were insufficient and that the car storage arrangement was made at the Railroad's request to relieve this condition. There is no allegation, contention or evidence that the storage ar-

rangement was not made in good faith, or was made to evade the tariff, or that the Cement Company stored any cars which the Railroad should not have stored for itself in the regular course of the Railroad's business. There is no allegation, contention or evidence that the storage arrangement ever adversely affected any shipper; on the contrary, it promoted the movement of traffic by "utilizing otherwise empty trackage owned by appellant in order to relieve congestion at an important railroad yard on an important interstate line" (R. 370).

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## III.

### THE DECISION OF THE COURT OF APPEALS ACCORDS WITH WELL-SETTLED LEGAL PRINCIPLES REGARDING THE NATURE AND ASSESSMENT OF DEMURRAGE.

Almost all demurrage cases since the adoption of the Uniform Demurrage Code in 1909 have involved that code, though we know of no case actually decided under the appropriation rule. At no stage of this case has any decision been cited in which a demurrage charge has been assessed on cars held by a shipper at the request of and for the benefit of a carrier. No case has been cited which would support in principle the imposition of such a charge; the cases demonstrate the contrary. They hold without conflict that demurrage is a charge to compensate the carrier for the use of its equipment, or a charge where detention beyond the free time allowed by the tariffs is for the shipper's use or caused by its fault or negligence, or a charge designed to obtain a prompt release of cars and thus prevent interference with the general traffic of the carrier.

This court said in *Turner Lumber Co. v. C. M. & St. P. Ry.* (1926) 271 U.S. 259, 262:

> "All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention."

In *Missouri Pac. Ry. Co. v. Union Stockyards Co.* (8 Cir. 1913) 204 Fed. 257, the court said (p. 259):

> "The imposition of demurrage implies delay through negligence or inattention, or a retention for personal uses, whereby the proper office of the cars in transportation is impaired."

In *United States F. & G. Co. v. Central of Georgia Ry. Co.* (1933) 226 Ala. 606, 147 So. 891, the court said (p. 893):

> "We think that, to justify a constructive placement, it must appear that the consignee required or contracted expressly or impliedly for all his carloads to be spotted on his private (or assigned track), and that due to his own conduct the railroad could not so place them. 10 Corpus Juris, 467, note 35. For 'no demurrage can be exacted by a carrier unless the delay in loading is clearly attributable to the fault of the consignee.' Louisville & Nashville R. R. Co. v. Camody, 203 Ala. 522, 84 So. 824; Granger v. Davis (C.C.A.) 2 F. (2d) 695."

The court pointed out that the shipper could not be charged for the carrier's failure to provide enough track, a circumstance paralleling this case, saying (147 So. 894):

> "If there was not sufficient trackage, it was not attributable to the shippers."

In Hartman, "Law and Theory of Railway Demurrage Charges," the author says that "a car does not become subject to the demurrage rules until it is held for some purpose of the consignee or consignor" (p. 33), and says further (p. 101):

> "From the decisions, hereinbefore considered, it is clear that to support an assessment of demurrage charges there must be proof that the cars were detained by or for the shipper or consignee, and not as a matter of convenience of the carrier, or as a result of its disability."

The application of these principles to the case at bar is clear. The cars in suit during the period of storage were held for the purposes of the Railroad. The Cement Company during that period was a bailee of the cars, not a shipper. There was no detention of equipment for the Cement Company's benefit and no use thereof for which the Railroad was entitled to compensation. The Railroad received a benefit from the storage arrangement, and nothing was taken from the Railroad. From all standpoints, we submit, the decision of the Court of Appeals is consistent and the contentions of the petitioner are not consistent with the authorities cited above.

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## IV.

### THE PETITION MAKES NO CASE FOR CERTIORARI WITHIN THE PRINCIPLES OF RULE 38.

The petition assigns three reasons for the issuance of a writ of certiorari (Petition, pp. 9-10). The first and second attribute to the Court of Appeals a decision that

demurrage tariffs can be circumvented or modified by agreement or understandings of carrier and shipper, thus violating the policy of the Interstate Commerce Act and establishing a precedent on a point of federal law which should be settled by this Court. The Court of Appeals, however, made no such rulings and had no reason to do so. This, we submit, is demonstrated by the Court's opinion, and by the statement of the case already given.

Petitioner's third reason (Petition, p. 10) is that the Court of Appeals construed the tariff differently than the Committee which drafted the original Demurrage Code in or about 1909. In actual fact the tariff provision on appropriation on which this case turns *was not a part of the tariff* at the time of the Committee report to which the petition refers. On this ground and other grounds to which reference will be made (infra 15-17) there is no inconsistency between the decision of the Court of Appeals and the statement of the Committee cited in the petition.

The petition fails completely, we submit, to bring the case within the principles laid down in Rule 38 of this Court. There is no conflict of decision between federal courts. No similar case on the facts has ever arisen, and in applying the demurrage tariff to the particular facts presented, the Court of Appeals followed well-settled legal principles (supra 11-13).

## V.

### REPLY TO SPECIFIC POINTS MADE BY PETITIONER.

**A. The present case involves no departure from the tariff provision; the ruling of the Court of Appeals is that "the tariffs themselves impose no liability for demurrage under the facts of the instant case" (Answering Petition for Certiorari, pp. 15-17).**

The petitioner's first point is:

> "Under the Interstate Commerce Act and related statutes there must be rigid adherence to tariff provisions and no court can make an exception thereto as exclusive jurisdiction to declare tariff provisions, or the resultant charges, unreasonable, prejudicial or otherwise unlawful is vested in the Interstate Commerce Commission."

As already pointed out, the Court of Appeals decided nothing contrary to this contention of petitioner. There was no exception or departure from the tariffs. The Court decided that the tariffs did not apply (R. 363-370).

**B. The construction given the tariff provision by the Court of Appeals is not inconsistent with the report of the Committee referred to by the petitioner (Answering Petition for Certiorari, pp. 8-10, 17-19).**

Petitioner contends that the Court of Appeals gave the tariff a meaning inconsistent with that "stated by the Committee, headed by Commissioner Lane of the Interstate Commerce Commission which formulated such tariff" (Petition, pp. 10, 19).

While the Committee report may be relevant (though not binding) in construing the tariff to which it refers, it is not relevant in this case for the conclusive reason

that the appropriation rule here involved (sec. D, Rule 6) was promulgated *long after the tariff to which the Committee's remarks were directed.*

The Demurrage Code, of which Commissioner Lane spoke, was one of the first efforts by the Railway Commissioners to formulate a standard code. As proposed in 1909, it was stated in less than five pages of the Convention's proceedings.[4] The present tariff, expanded under the experience of forty years, covers over 200 pages of fine print.[5] The appropriation provision involved in this case (sec. D of Rule 6) was not a part of the 1909 code and, so far as appears from the full report of the proceedings of the Convention, the Committee did not consider any like provision.

Beyond this, Commissioner Lane's remarks were directed to a situation explicitly described in his statement (quoted Petition, pp. 18-19), and are irrelevant to the facts of the present case. They referred to a practice under which industries, performing their own switching, would receive *loaded* cars and instead of returning them after unloading, would "capture" them and—as Commissioner Lane points out (Petition, pp. 18-19)—*"hold them for their own purposes."* This is not the present situation, because the cars here were held for the account and benefit of the Railroad.

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[4]National Association of Railway Commissioners, Proceedings of the Twenty-first Annual Convention. Held at Washington, D.C. November 16-19, 1909, pp. 207-212.

[5]This tariff is Exhibit I, certified to the Court of Appeals in its original form, and not reproduced in the record before this court because of its bulk. See Petition, p. 3, n.

Petitioner's argument in effect construes the passage quoted from Mr. Lane's Committee as meaning that any placement of cars on an industry track immediately starts a liability for demurrage. Obviously, no such sweeping meaning was intended; liability for demurrage depends on whether the facts presented bring the case within the pertinent tariff provision.

**C. The Court of Appeals did not disregard the provisions of the tariff or hold that an appropriation depends upon intention and understanding "to be determined from a presumption of lawful contract" (Answering Point III, Petition for Certiorari, pp. 23-29).**

The Court of Appeals did not uphold an agreement modifying the tariff. It held that the uncontradicted evidence established that there was no appropriation within the meaning of the tariff provision. Of such uncontradicted evidence the presumption of lawful conduct is a proper part under the authorities cited (R. 367). But the decision does not depend upon this presumption. The Court of Appeals pointed out that the arrangement whereby the cars were stored for the carrier's account and convenience was "conclusively established" by the letters of the Railroad officials and testimony of the witnesses (R. 361). The arrangement so established contains none of the elements by which demurrage charges may be justified (authorities supra 11-13).

The Railroad argues that demurrage must depend on uniform and objective tests "with no possibility of variation in application based on subjective matters, such as understandings and intentions" (Petition, p. 24). There may be circumstances where such a statement would be

relevant, but it is not relevant here. There is no principle of law, we submit, under which demurrage tariffs establish a liability unless the facts bring the case within the language of the tariff. If there is liability, then public policy requires that the proper demurrage charge be paid, but policy does not change the facts on which liability or nonliability depends. Applying this to the tariff language, a movement of cars at the carrier's request to a place of storage—in this case even bad-order cars not fit for service (R. 303)—cannot be made by any rule of law or policy into an appropriation of cars by the shipper, nor is there any rule of law or policy which would make the Cement Company a consignor against facts showing that it was a bailee of the cars for the Railroad.

The case of *Chrysler Corp. v. New York Central R. Co.* (1939) 234 I.C.C. 755, cited by petitioner (p. 24), is not in point. The case at bar is concerned with determining who is a consignor and when he *becomes* a consignor. In the *Chrysler* case the Commission was concerned only with the question when an admitted consignor *ceases* to be such. Chrysler contended that it ceased to be a consignor when a sit-down strike occurred in its plant, arguing that it was powerless to deliver the cars to the carrier and they were, in effect, being held by the strikers. The Commission concluded that "There was no change in the status of the cars just prior to the strike, when they were admittedly held by" Chrysler, and as the subsequent delay was not due to the fault of the carrier, demurrage was properly assessed (234 I.C.C. 758).

If in the *Chrysler* case, Chrysler had notified the carrier that the cars were ready for delivery and if the

carrier had then asked Chrysler to let the cars stay on Chrysler's tracks until the carrier could eliminate congestion on its own tracks, the situation would have been analogous to the one at bar. Chrysler in such circumstances certainly would not have been liable for demurrage under the tariffs.

The concluding paragraph of the argument under petitioner's Point III is that the noncollection of demurrage charges gives the Cement Company "an unlawful advantage and concession by making available to Respondent on its own tracks a large supply of empty freight cars without charge and without tariff authority therefor" (Petition, p. 29).

This contention obviously begs the question—if there was no appropriation, there was no basis for a demurrage charge, and no illegality in not collecting one. But beyond this, the contention is fundamentally unsound. It was the Railroad's duty, as pointed out by the Court of Appeals (R. 368, citing *Davis v. Cornwell* (1924) 264 U.S. 560, 561) to use diligence to provide the shipper with a reasonable supply of cars and to provide facilities for handling them. We repeat that there is no claim and no evidence that the Railroad ever made any unreasonable accumulation of cars for the Cement Company, and that there is no claim and no evidence that the Cement Company ever got any cars which it was not the Railroad's duty to provide. There was no "unlawful advantage and concession" (see also on this point R. 368, and infra 20-22).

**D. The alleged finding of the District Court relied upon by the Railroad was actually an erroneous conclusion and was properly disregarded by the Court of Appeals (Answering Point IV, Petition for Certiorari, pp. 29-36).**

The Court of Appeals pointed out that the evidence on the material points of this case is uncontradicted (R. 361, 366, 367). The so-called finding of the District Court upon which the Railroad relies, and which it contends that the "Court of Appeals erred in disregarding" (Petition, p. 29), is the following statement in finding 9 (R. 61-62):

> "Having in mind the nature of the testimony, *it is a fair inference* that the placing and holding of such cars on Defendant's tracks, even if for the benefit of Plaintiff, was also of advantage to Defendant."

From this inference the trial court drew the following conclusion of law (R. 64):

> "• • • because the evidence is sufficient to show a benefit in fact to Defendant as well as to Plaintiff, the Defendant is liable for demurrage computed as set forth in the Demurrage Tariffs."

There is, however, no provision in any tariff which provides a demurrage liability on cars not ordered or appropriated by the shipper simply because some incidental advantage can be traced to the shipper in the transaction. There is no tariff rule and no case which supports the conclusion that the Cement Company is liable simply "because the evidence is sufficient to show a benefit in fact" to both parties.

As already pointed out, the only benefit to the Cement Company was a benefit *to which it was legally entitled and which did not flow from the storage of cars on the*

*Cement Company's tracks.* The Railroad as a common carrier had the legal obligation of using due diligence to maintain a reasonable supply of cars at Gerlach; this required reasonable storage facilities since on undisputed evidence the car supply could not be properly handled "on a day to day basis" (R. 244). So long as the cars remained in storage on the Railroad's track there was no possibility of demurrage, but the Cement Company had the advantage of their availability. This was an advantage to which it was legally entitled as a shipper; nothing more. The Cement Company obtained no added advantage when, at the Railroad's request, it permitted storage of cars on the industry tracks. As the Court of Appeals said (R. 368):

> "Such a benefit to appellant was incidental and consisted of the assurance of a regular car supply, a benefit which appellee was already bound by law to use every reasonable effort to afford."

The petition says that the Cement Company "was *repeatedly* after petitioner to bring more cars" and "was so concerned with this subject that it caused it to be handled on the highest possible level" between the presidents of the two companies (Petition, pp. 31, 32). This broad statement is supported by *one* record reference which is to *one* letter written by the shipper's president near the end of the twenty-year period during which the car storage arrangement continued (R. 297-298). Beyond this there is nothing wrong or unusual about a shipper's "getting after" a carrier for cars, as the Railroad's officials fully recognized (see R. 168-169). Shippers are en-

# In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 404

THE WESTERN PACIFIC RAILROAD COMPANY (A CORPORATION), PETITIONER

*v.*

PACIFIC PORTLAND CEMENT COMPANY (A CORPORATION), RESPONDENT

## BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 27 (9) (d) of the Revised Rules of the Court the Interstate Commerce Commission, as *amicus curiae,* submits this brief in support of the petition for writ of certiorari herein.

The decision of the United States Court of Appeals for the Ninth Circuit, review of which is sought by the petition, is reported in 184 F. 2nd 34 (R. 358). The lower court held that the intentions and understanding of the carrier and shipper govern the interpretation of the word "appropriate" of the demurrage tariff. The decision establishes a precedent which will seriously hamper the uniform application of the demurrage

rules and enforcement thereof by this Commission when applied to cars used by shippers having plant railroads.

## STATEMENT OF FACTS

The basic facts and tariff provisions involved are stated in petitioner's "Statement of Matter Involved" (Petition for Writ of Certiorari (pp. 2–8)) and in the interest of brevity will not be stated herein.

## ARGUMENT

The lower court erred in ruling that the intentions and understanding of the parties control the interpretation of the word "appropriate" in the demurrage tariff when the facts show clearly that the shipper obtained exclusive physical control of the cars at the time it removed them with its own locomotive from the railroad tracks to its private track and hauled them to its plant located 5 miles away from the railroad and that it invariably loaded the cars before returning them to the railroad.

One of the primary purposes of the Interstate Commerce Act is to place all shippers on an equal basis so that under similar circumstances no individual shipper can obtain from a railroad a service denied to others. The demurrage tariff contains uniform rules applicable to car detention by shippers throughout these United States. It is therefore of the utmost importance, particularly in these days of car shortage, that those

rules be applied uniformly and strictly. The effect of the decision of the lower court will be to create a multitude of unpublished exceptions to otherwise uniform demurrage rules which will be limited only by the number of shippers performing their own plant switching. And the extent of the advantage which an individual shipper can obtain under this decision will depend upon the amount of pressure he can bring to bear upon the railroad for a private arrangement or understanding.

The applicability of demurrage tariff rules and charges is not merely a subject of contract between an individual railroad and an individual shipper. There is a paramount public interest involved. The issue in this case is one of importance to railroads and shippers throughout the country. It goes beyond the sum of money involved in the suits and the so-called equities of the case. This Commission, during the past several years of car shortage, has protected that public interest by ordering substantial increases in demurrage charges to reduce to a minimum the detention of freight cars by shippers. The maximum utilization of freight cars throughout the country is, and has been for the past several years, a matter of grave nationwide concern. If now, as the lower court in effect holds, the application or non-application of the demurrage tariff is to depend not upon the actual acquisition and detention of freight cars by a shipper but upon

some informal arrangement made between a local railroad freight agent and an employee of a shipper, the effectiveness of the rules will be destroyed. It simply must not be that the language of the demurrage tariff can be set at naught by the simple expedient of informal understandings and intentions of the parties.

At the request of this Commission, criminal actions involving storage of cars on shippers' tracks for alleged carrier's convenience have been successfully prosecuted against carriers and shippers, including the parties to this suit, in several jurisdictions. Today similar proceedings are pending at Milwaukee in the United States District Court for the Eastern District of Wisconsin the disposition of which will in all probability be governed by the case at bar.

We believe the lower court's decision adversely affects the administration and enforcement of the Interstate Commerce Act and generally the rights of interstate shippers and carriers by railroad, and presents an important question of Federal law which should be decided by this court.

Respectfully submitted.

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